OCT 31 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 288

CHARLES MULLEN,
Petitioner,

vs.

FITZ SIMONS & CONNELL DREDGE & DOCK CO.,
a corporation,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The District Court heard the trial and entered judgment against petitioner for failure of proof.

The opinion of the Court of Appeals, reported at 191 F.(2d) 82 (adv. sheets), reviews the record, and affirms. That Court said:

"In his brief plaintiff says: 'The errors relied on arise out of the judgment of the court dismissing the

plaintiff-appellant's case on the merits and sustaining the defendant's motion for a directed verdict, and in failing to find that plaintiff's case was made out by substantial evidence sufficient to sustain the material controverted issues in favor of the plaintiff.'

"In support of its motion for directed verdict, defendant contends in part: (1) there is no proof of any negligence on its part which was the cause of plaintiff's injury; (2) there was no evidence that the equipment and appliances aboard the tug were defective in any particular; (3) plaintiff himself was guilty of the negligence which was the sole proximate cause of his injury; and (4) plaintiff's injury was caused solely by his failure to perform his own duties as a deckhand, without negligence on the part of defendant.

"The contentions presented require a brief statement of the evidence."

The Court of Appeals then proceeds to state the facts as shown by the record. For convenience of reference we quote below from the Court's opinion.

The Court's statement is a corrective for the violently distorted and misleading narrative that petitioner weaves into the prolix discussion he files here. The Court of Appeals said:

"Plaintiff is an able-bodied seaman with thirty-three years experience on the Great Lakes. On September 22, 1947, he was employed as an extra by defendant, working as a deckhand on the tug boat John J. Roche, which was engaged in towing loaded scows from Indiana Harbor into Lake Michigan for dumping. The tug was about 84 feet long overall, 20 feet wide, 12½ feet in depth, of which 14 inches was above the water line. Above the deck's level was a deck house and forward, a pilot house. The deck house had several doors which, when closed, kept out the lake water. Among his duties, the deckhand was supposed to close these doors in rough weather. In the middle of the deck house, on the starboard side, was a fire hole door, in addition to the door to the pilot house. Next,

astern to the fire hole door, was an engine room door, and farthest back, at the end of the deck house, was a galley door. Inside this door, steps led down to the galley below the deck, a hand rail was provided for use on these steps. The galley door was about three feet wide and five feet high. It was made of steel and swung outward, with hinges on the side toward the front of the tug. A hook attached to the deck house wall could be hooked over the top of this door to keep it open.

"A captain, engineer, two firemen, and deckhand, as required by the steamboat inspectors, made up the crew. Plaintiff was the deckhand. The boat was regularly inspected by the United States Steamboat Inspectors, as required by law.

"Handling mooring lines, helping the fireman in dumping ashes from the boiler room, and closing hatches, when necessary to keep the tug from taking water in rough weather, were among the duties of the plaintiff as deckhand.

"The tug was docked in Indiana Harbor, an artificial harbor, formed by breakwaters facing the lake with a gap, through which vessels pass, near the center of the Harbor . At the gap of this inner breakwater, a green light is fixed. A second breakwater projects directly into the lake proper at the end of which is fixed a white light. Going toward the lake, after passing the gap in the inner breakwater, marked with the green light, a ship is in the lake proper. Passing beyond the breakwater with the white light, puts the vessel farther out into the lake.

"After arriving for work at the Indiana Harbor dock on the morning of September 29, 1947, plaintiff saw that the lake was heavy and rough. From the dock, plaintiff could see the water spray striking the top of the catwalk astride the breakwater enclosing the harbor. Within the harbor the water was choppy. The number of scows that can be towed on a given day depends on the weather. The condition of the weather can best be determined from an examination out in the lake itself. This is called 'going out to look at the weather.' Plaintiff had gone out to look at the weather on tug boats many times before.

"A civil engineer employed by defendant, and a scowman, who rode loaded scows, accompanied the crew of the Roche when the captain gave the order to go out and look at the weather. When the whistle signal was given, plaintiff cast off his mooring lines, one of the firemen cast off the other line, and the tug proceeded toward the breakwater gap which afforded access to the lake. A standing order aboard the Roche required the deckhand to close up the tug in heavy weather. Plaintiff was told about the standing order, and also testified it was his job as deckhand to do that. He further testified that the tug should have been closed up in weather such as he could see from the dock before he started out into the lake. The captain testified that he told plaintiff personally that standing orders required him to close up in heavy weather. There was no contradiction to the testimony given by the captain as to the standing order.

"After passing the gap in the breakwater, the Roche entered the lake and ran into a heavy sea, which impeded its speed. The decks of the Roche were awash from waves of water. At times, the waves hit the breakwater causing a spray of water forty to fifty feet high. Plaintiff could see that the tug was going beyond the end of the breakwater projecting into the lake. As the tug proceeded, plaintiff said he was dumping ashes into the lake and when it became too rough to remain on deck he headed inside by way of the galley door, that being then the last door astern on the starboard side. A wave of water followed him in as he stood on the first or second step leading downward to the galley, with his hand between the door jamb and the hinged side of the galley door. While in this position the door closed, pinching his right hand. No one on board witnessed the accident. A hand rail was provided for holding on, located on the steps directly in front of plaintiff as he stood there facing forward. Plaintiff said he never used the hand rail and he did not use it on this occasion. Plaintiff said the accident happened as the tug was turning around, stating that he jumped into the galley stairway before the tug began to turn.

"There is no proof that the hook used to keep the galley door open was defective. Besides, plaintiff

abandoned his charge of unseaworthiness and elected at the outset of the trial to proceed on his charge of negligence. He produced no evidence on unseaworthiness. The record shows no proof of negligence on the part of defendant. Damages may be recovered under the Jones Act only for negligence. *DeZon* v. *American President Lines*, 318 U. S. 660-671-672, 63 S.Ct. 814, 87 L.Ed. 1065. It is clear to us that plaintiff failed to sustain his burden of proof on his claim of negligence.

"We believe that the trial court properly directed a verdict on count one of the complaint, because viewing the evidence in the light most favorable to plaintiff, together with all reasonable inferences and deductions which may be drawn therefrom, *Gilberto* v. *Yellow Cab Co.*, 7 Cir., 177 F. 2d 237; *Reno Sales Co., Inc.* v. *Pritchard Industries, Inc.*, 7 Cir., 178 F. 2d 279, it appears that his injury was caused solely by his failure to perform his known duty as a deckhand. He did not shut the galley door, when he saw that the tug was going out into the lake in a heavy sea. The evidence convincingly shows that his own negligence was the proximate cause of his injury."

Mullen v. *Fitz Simons & Connell Dredge & Dock Co.*, 191 F.(2d) 82, 83-84.

As we understand the decisions of this Court and the Courts of Appeals, it was peculiarly the function of the District Court, that heard all the evidence and had the "feel" of the trial, to determine whether there was substantial evidence to make a case for the trier of fact. (*Boston & M. R.R. Co.* v. *Coppelletti*, 167 F. 2d 201, 202, 204 (CA 1, 1948) and cas. cit.)

The District Court conscientiously performed that duty, taking time to consider and hearing argument. The District Court determined that on the uncontradicted record petitioner was hurt because he failed to shut the door when he knew the small tug was going out to look at the weather in a heavy sea, in violation of his duty "to his vessel, his shipmates and himself." Upon petitioner's

appeal the record was reviewed, as above, by the Court of Appeals.

Petitioner filed no petition for rehearing in the Court of Appeals, for which its rules provide. (Rule 22, C. A. 7.) His presentation here is in self-confessed violation of the rules of this Court. (Br. 9.)

Our temptation is to take up the many incorrect factual statements of petitioner's presentation, and pillory them, one by one, doing all over again what now has been done twice, once in the District Court, and once in the Court of Appeals. The question passed on by the concurring courts below, was as to the presence or absence of "substantial evidence" to make a case for a trier of fact. The Petition nowhere asks this Court to overhaul the facts and redetermine that question. On the uses of certiorari to review that question, this Court, again, has recently pointed out unanimously that this is not the place to re-examine the facts. (*Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502 (1950).) We suppose the doctrine has especial force and application when petitioner, failing to file a petition for rehearing, has not exhausted his remedy in the courts below.

Accordingly, we point to the evidence as stated by the Court of Appeals.

The fundamental impression that petitioner labors to achieve on brief is that, although it was his duty as the deckhand on this small, low-lying tug with only 14 inches above the water line to close the steel doors in the deckhouse—doors which existed for the precise purpose of being closed in such weather—nevertheless he had no warning that the vessel was going to go out into the heavy weather. (Brief 16 and *passim.*) A reading of the facts stated by the Court of Appeals, and above quoted, shows

petitioner's suggestion to be entirely false—by petitioner's own testimony at the trial.

Petitioner's admissions that he was an experienced seaman on duty as the deckhand, who saw the situation, knew his own deckhand's duty in the situation to shut the deckhouse doors, and did not do it, seems to render petitioner's highly inaccurate discussion of his orders irrelevant. The Court of Appeals has quoted certain of petitioner's flat admissions as to the order that was given—to go out and look at the weather—and of his understanding that his deckhand's job in such weather, as he testified he could see he was "going to get into" before he ever left the dock, was to have the deckhouse doors shut. Beyond that, petitioner's brief here wilfully fails to distinguish between orders given on a particular occasion and standing orders on the vessel. Assume that the captain did not tell him "personally" to shut the deckhouse door on this occasion; he knew it was his deckhand's job, and so testified. Moreover, the captain's testimony to the *standing* order to close the doors in heavy weather, and that *he knew personally* that petitioner had been made aware of that *standing* order, is not contradicted, as the Court of Appeals points out. In any case, he admittedly knew his deckhand's job in the situation, whether he knew it from 33 years experience as a seaman, or from the standing order, and he got hurt because he did not do it.

Beyond this, there seems to be no conflict that even after the tug passed the gap in the inner breakwater where the spray was coming over high in the air and got into the high rolling sea, this man *still* let the door stand wide open.

All this is over and above his perverse election to hold onto the crack of a door jamb, when the employer had provided a handrail.

Petitioner's brief says the hook was not inspected. (Br. 25.) He makes no reference to the record, as he would if there were any such evidence. The Court of Appeals points to the official inspections of the vessel.

Petitioner's brief refers to the hook as "defective," again without reference to the record. (Br. 16.) Elsewhere his brief concedes there was nothing "specifically" the matter with the hook. The petitioner's simple duty to have this door shut in a "high, rolling sea" (as petitioner's brief well calls it) is plain beyond argument on the face of petitioner's own testimony stated by the Court of Appeals.

Perhaps the best commentary upon the presentation made for petitioner by his counsel here, and upon the whole situation, is furnished by petitioner's counsel himself. In contrast to his unsupported statements here, he told the District Court, which heard the trial and knew the record, this:

> "I will agree with counsel and your Honor, if this were a trial solely for negligence in accordance with the old common law conception, I agree; your Honor would have to direct a verdict for the defendant. Our position is that negligence under the Jones Act is far broader than the common law conception of negligence; and it is our further position under the Jones Act, coupling the maritime rights which are included in the Jones Act with negligence then that definitely is sufficient and does make the employer an absolute insurer of the plaintiff in that he is required to give him a safe place to work." (R. 238.)

That is, indeed, the question presented: is the employer an insurer? To state it in terms of the facts of the case, does the Jones Act make the employer an insurer of a seaman against the consequences of his own failure to do his known and simple duty?

Plaintiff elected to proceed on the Jones Act.[1]

After that statute was adopted in 1920 the proposition was urged on this Court in various disguises that it made the shipowner an insurer. That is the proposition on which petitioner puts his case, in the District Court, and here. He presented it without disguise to the District Court, as above quoted. The disguise he puts upon it here is transparent: that the Jones Act, though it merely adopted legislation that requires proof of *negligence*, means something else, viz., "liability without fault as for unseaworthiness." (Br. 15 and *passim.*) The decisions, including the decisions of this Court, are all the other way.

> "But damages may be recovered under the Jones Act only for negligence. (Cit. auth.) Whether the legislative policy of compensating only on the basis of

[1] As petitioner's complaint points out (R. 6) the "Jones Act" adopts for seamen the rights given railway employees by the Federal Employers Liability Act, and his complaint further states: "This action arises under Section 33 of the Merchant Marine Act of 1920, 46 U.S. Code, Sec. 688 [The Jones Act] as hereinafter more fully appears." (R. 4.) At the commencement of the trial defendant moved in writing to compel the plaintiff to elect whether he would proceed on the statutory right to recover for negligence given by the Jones Act or on the admiralty basis of unseaworthiness. (R. 17.) (*Pacific Co.* v. *Peterson*, 278 U. S. 130, 138 (1928).) Before the Court could rule plaintiff's counsel announced that he had elected and continued to elect his Jones Act rights for negligence, an election which he reiterated to the Court of Appeals in his brief to that Court in the following terms: "The plaintiff, again repeats for the Nth time that he is proceeding under the Jones Act, and that his right to recovery in this case depends upon proof of negligence thereunder." (Br. 9.) That plaintiff had voluntarily and repeatedly elected the Jones Act right for negligence was pointed out to the District Court; plaintiff's counsel in reply did not deny it, but again affirmed it, saying: "Briefly our position is this, that in an action under the Jones Act which we have elected, and which I again repeat is the substance of this case," etc. (R. 38.)

proven fault is wise is not for us to say, nor is it our function to circumvent it by reading into the law a theory, however disguised," etc.

DeZon v. *American President Lines*, 318 U. S. 660, 671-672 (1942).

Assume for the moment (contrary to undisputed fact) that the purpose of the hook was to hold the door open in heavy weather. Even then, there is no evidence of negligence. For, if one thing is more firmly settled than any other in the law of negligence, it is that the mere failure of a device is not evidence of anyone's *negligence*. This Court is unquestionably familiar with that elementary proposition. The force of the rule in actions under the Jones Act is clearly illustrated by *Cannella* v. *Lykes Bros. S. S. Co.*, 174 F.(2d) 794, 795 (CA 2, 1949). There a seaman was injured by the breaking of a ladder rung on his ship. It was held that the mere failure of the rung was no evidence to support a verdict for the plaintiff:

"* * * we hold that there was no evidence to support a verdict of negligence against the defendant. It is true that the ladder was old, that the ropes were frayed, and that the bottom rungs were gone—apparently because they had been crushed by vessels coming alongside. However, the plaintiff did not fall because the ropes broke, or because there were no lower rungs, but because one of the rungs higher up gave way. The general condition of the ladder did indeed justify an inference that it had become unfit in the respects we have mentioned, and that ought to have been examined. It may be that the defect in the rung would have been disclosed upon such an examination, but there was no testimony that it would, and, as the record stands, the failure to inspect had no connection with the injury."

(*Ibid*, 795).

There is here, moreover, uncontradicted inspection, and no claim that there had ever been a report of anything wrong.

The language of the Second Circuit Court of Appeal just quoted from the *Cannella* case is plainly an application in the law of seamen's recoveries (the Jones Act, 46 U.S.C.A. 688, adopts for seamen the rights of the Federal Employers' Liability Act) of a rule that this Court has tersely stated:

> "The Federal Employers' Liability Act permits recovery upon the basis of negligence only. The carrier is not liable to its employees because of any defect or insufficiency of plant or equipment that is not attributable to negligence."
>
> *Delaware L. & W. R. Co.* v. *Koske*, 279 U. S. 7, 10 (1929).

In an action under the Jones Act, there was evidence of previous trouble with the stem of a vessel (no such evidence exists here). The court, after pointing out that the Jones Act for seamen is derivative from the Federal Employers' Liability Act, held:

> "It will thus be seen that negligence is the gravamen of this case. (Cit. auth.) Defective appliances are not *per se* due to the negligence of the employer, as in other cases in admiralty, and 'he is not liable for any defect or insufficiency in plant or equipment that is not attributable to negligence.' (Cit. auth.)"
>
> *American Pacific Whaling Co.* v. *Kristensen*, 93 F.(2d) 17, 19-20 (CA 9, 1937).

This Court holds flatly:

> "But damages may be recovered under the Jones Act only for negligence."
>
> *DeZon* v. *American President Lines*, 318 U. S. 660, 671 (1942).

The facts in the present case are far less favorable to plaintiff than the foregoing authorities assume. As the Court of Appeals pointed out, there is *no* evidence here of any "defect," there was uncontradicted evidence of regular

inspection, and the hook was *not* meant to hold the door open in heavy weather, when the door was meant to be closed. The purpose of having a door was (as the Court of Appeals points out that the plaintiff himself testified) so that it could be closed in heavy weather such as he said he could see the small vessel was going into before it ever left the dock. It was not the purpose of the hook to hold the door open in heavy weather when the door existed for the very purpose of being closed—as the plaintiff said he knew. This Court holds under this employee legislation that when a device does not perform a purpose for which it is not meant to be used, that does not show negligence of the employer.

Thus in *Brady* v. *Southern Ry. Co.*, 320 U. S. 476 (1942) other employees ran a train over a derailer in the opposite direction from that for which the derailer was designed. Because it was the opposite direction, a heavier strain was thrown on the other rail directly across from the derailer. This opposite rail was proved by evidence to be defective, and broke, and there was a fatal accident. The Supreme Court, granting certiorari in order to make the law clear, affirmed the lower appellate court in reversing a verdict for the plaintiff. The Supreme Court's analysis, in sustaining this directed verdict, of the legal situation arising when a device furnished by the employer is used differently than intended—as this hook was used by plaintiff to hold open in heavy weather a door that existed for the purpose of being closed in such weather—is significant.

> "Such evidence, we assume, would justify a finding for petitioners, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the closed derailer a danger reasonably to be anticipated. As to the likelihood of cars passing over the wrong end of derailers, one witness with ten years' experience as a brakeman testified

that he recalled three or four instances. Another, the Superintendent of the railroad with 22 years' experience said, 'It happens very frequenly. I would say yes, I have seen it 25 to 50 times.' The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351; *St. Louis-San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344, 348; *New York Central R. Co.* v. *Ambrose*, 280 U. S. 486;*Baltimore & Ohio R. Co.* v. *Tindall*, 47 F. 2d 19; *Texas Gulf Sulphur Co.* v. *Portland Gas Light Co.*, 57 F. 2d 801. Cf. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 566.

"The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469, at 475."

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 483 (1943).

While it is true that this plaintiff at the commencement of the trial elected to proceed on negligence instead of unseaworthiness, it is evidence that the point of the *Brady* case, just quoted as to the unintended use, has parallel application *a fortiori* where unseaworthiness is the question. In *Adams* v. *Bortz*, 279 Fed. 521 (CA 2, 1922) a verdict for plaintiff who sought recovery for unseaworthiness was reversed. The court concludes a careful discussion of "unseaworthiness" as follows:

"That a vessel is not called upon to have the best appliances is no longer a debatable question. The New York, 204 Fed. 764, 123 C.C.A. 214; In re *Tonawanda Iron & Steel Co.* (D.C.) 234 Fed. 198. And out of all these definitions there survives the proposition, which, like most elementary propositions, must be occasionally restated, that the equipment or appliances

need be only that which is reasonably safe *for its purpose.*"

(P. 525.) (Our emphasis.)

Reversing a verdict for an injured seaman (a steward) the court said:

> "Ships roll, and those who go to sea must have sea legs. Deck cargoes are old, and it matters not whether they consist of coal or machinery. A sudden lurch of the ship in a heavy sea might just as likely have thrown a seaman off his balance on a stairway below the poop deck as above it, and just as readily whether there was a handrail of iron or of wood. Thus the point is whether there was any evidence whatever as to the position and construction of this bin, or the construction of this stairway, from which a jury could determine that the bin and stairway on this freighter were not *reasonably safe for the performance of the required and normal duties of this plaintiff.*" (Our emphasis.)
>
> (*Ibid*, 525.)

If the plaintiff had performed "his required and normal duties" this door would have been closed, by him, before the vessel got out into the heavy seas that he saw, even from the dock.

> "With reference to the handrail on the ladder, it is sufficient to say that the shipowner is not obliged to furnish the best possible accommodations or equipment for his crew; that no statute requires two handrails, and that the testimony supports the conclusion of the trial judge that the absence of one handrail did not make the vessel unseaworthy in that regard. Furthermore, an inspection of the photograph of the ladder and its surroundings in evidence shows that on the side opposite the handrail there is a vertical stanchion which could be used as a hand hold on that side.
>
> "With reference to the ladder being too nearly vertical so that the steps provided an insecure foothold to the seamen going down the ladder facing away from the steps, it is sufficient to say that the position of

the ladder was well known to the appellant who used it daily and that if in his judgment there was insufficient foothold provided by the steps while facing forward, there is no good reason he should not have turned about and faced the ladder, thus getting a more perfect foothold in order to come down the ladder."

The Baymead, 88 F. (2d) 144, 147 (CA 9, 1937).

But the evidence bears even more heavily against this plaintiff than in the cases cited. Not only is there no evidence of any defect, uncontradicted evidence of inspection, and confession that the hook was being used for an improper purpose when used to hold open a door that existed for the very purpose of being shut in such weather. There is here a confession by plaintiff that it was he himself who should have shut that door. The Court of Appeals quoted his testimony. He testified that he had seen spray going 40 to 50 feet into the air above the inner breakwater, before the small vessel left the dock. He testified that he knew they were going out to look at the weather. Plaintiff said he could see the vessel was going still further, past the white light at the end of the outer breakwater. He testified that the purpose of the door is to keep out the seas, which is accomplished by shutting it, especially in such weather as he could see they were going into before they ever left the dock. He testified that it was the deckhand's job to shut the door under those conditions, and that he was the deckhand. A seaman cannot hold his employer responsible for the consequences of his own failure to do what he admits to be his known and simple duty. The seaman himself has duties to perform in making a vessel a "safe place to work," and if he had done his duty, it would have been perfectly safe. He cannot recover when his own failure of duty made it unsafe. The law of seamen's recoveries is perfectly plain on this.

"It is clear to me that Battice failed to sustain his burden of proof on the claim of negligence. He was

> responsible for the proper stowage of the ice box, and the evidence makes it obvious that he completely controlled access to the box. Battice did not even pretend to know who was responsible for leaving the ice in such condition that it would be disturbed by the motion of the ship. But the sole responsibility for proper stowage was his, and it was his negligence that was the proximate cause of the accident. I do not accept his suggestion that perhaps a messman violated his instructions. Even had Battice sustained this guess by proof, which he did not, the fact would still remain that it was Battice's duty to see to it that the ice box was at all times a safe place in which to work, and his violation of his own duty was thus the proximate cause, and the only proximate cause, of the damage."
>
> *Battice* v. *U. S.*, 79 F. Supp. 932 (D.Ct., N. Y., 1948) at 933.

Plaintiff's attempt to get away from the law as declared in the cases is not in all respects consistent or clear, as it seems to us, but after studying his brief it would appear to come down to a few propositions. Most of them seem to us to carry their own refutation.

Plaintiff rings the changes on the duty of the employer to furnish a "safe place to work." He never states that duty accurately. The employer is not insurer. His duty is not absolute. It is only to avoid negligence: viz., to use ordinary care to provide a safe place to work—or, if plaintiff had not elected negligence, but had chosen to proceed on unseaworthiness, then to provide equipment "*reasonably* safe for its *purpose*"—"*reasonably* safe for the performance of the *required and normal* duties of this plaintiff." (Auth. cit.) As to authority, plaintiff's reliance is on a dictum to which two judges dissented in the Seventh Circuit, whose subsequent citation to the Supreme Court of the United States evoked this astringent comment:

> "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make

the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. (Cit. auth.)"

* * *

"There are some who think that recent decisions of this Court which have required submission of negligence questions to a jury make, 'for all practical purposes, a railroad an insurer of its employees.' See individual opinion of Judge Major, *Griswold* v. *Gardner*, 155 F. 2d 333, 334. But see Judge Kerner's dissent from this view at p. 337 and Judge Lindley's dissenting opinion, pp. 337-338."

Wilkerson v. *McCarthy*, 336 U. S. 53, 61-62 (1949).

Equally without support of authority is plaintiff's suggestion (he cites no pertinent authority) that negligence is unseaworthiness under the Jones Act. It is difficult for us to understand what he meant by his election to pursue his Jones Act remedy which, as he puts it "depends upon proof of negligence" (note 1, *supra*) if, as he now contends, negligence is unseaworthiness. However that may be, unseaworthiness is something which exists without negligence. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 100 (1944). And to say that negligence is unseaworthiness is to say negligence need not be proved under the Jones Act, which is to disregard all the authorities, e. g.:

"But damages may be recovered under the Jones Act only for negligence."

DeZon v. *American President Lines*, 660, 671 (1942).

And see authorities cited at page 11, *supra*. No case ever said what plaintiff attempts to say. He cites no case which supports that. He is driven to that position precisely because he has not proved negligence.

Wholly aside from the absence of proof of negligence, there is equally no proof of the unseaworthiness plaintiff

says is its equivalent. He admitted that there was no evidence of any defect in the hook or door. And it is unassailable (nor does he assail it here) that such appliances need be only those "reasonably safe for the performance of the required and normal duties of this plaintiff" *Adams* v. *Bortz,* 279 Fed. 521, 525 (CA 2, 1922). The "required and normal" duty of this plaintiff, as deckhand, he testified, was to have this galley door closed before his vessel got into weather like that in which he suffered his injury. With that testimony he refutes any unseaworthiness and identifies the cause of his injury—his *own* failure to perform his *known duty.*

As a last resort, having failed to prove negligence, plaintiff confesses his failure by reference to *res ipsa loquitur.* Its inapplicability is apparent since plaintiff himself was in control of the situation. His accident happened because of the open door. It was his job to close it. And had he done so, the accident could not have happened. In the case he relies on, *Johnson* v. *U. S.,* 333 U. S. 46, *another employee* dropped a block on the plaintiff. *Res ipsa loquitur* never applies where the person injured was in control of the situation. *Asprodites* v. *Standard Fruit & Steamship Co.,* 108 F. (2d) 728 (CA 5, 1940):

> "There is no basis for the application of the doctrine of *res ipsa loquitur* when the thing that caused the injury is under the exclusive control and management of the injured party."
>
> (*Ibid,* 728)

Res ipsa loquitur is *not proof* and it does not supply a want of proof. (*Smith* v. *U. S.,* 96 F. (2d) 976, 978 (CA 5, 1938), and cases cited.) Plaintiff cannot escape, by referring to it, the complete lack of evidence to support his claim.

Plaintiff cites *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1945). In the first place, contrary to plaintiff's state-

ment (Br. 17) that was not a Jones Act case. A longshoreman (employed by an independent contractor) was injured aboard the vessel. The corporate defendant which appealed to the Supreme Court had been found *not negligent*. In that court it did not contest a finding of unseaworthiness below but chose rather to rely on a denial that this particular plaintiff was entitled to the benefit of the seaworthiness obligation. The Supreme Court held that he was. There is nothing in that to help this plaintiff who was beyond doubt a seaman. Neither the *Sieracki* case nor any other case requires more of defendant than that his appliances be "reasonably safe for the performance of the required and normal duties of this plaintiff" (*Adams* v. *Bortz*, 279 F. 521, 525 (CA 2, 1922). Defendant provided a door which was to be kept closed in rough weather and a deckhand (the plaintiff) whose "required and normal duty" was to close it, as he knew.

Plaintiff refers indirectly to a quotation from Willock's Commentary preceding 46 U.S.C.A. 688, as an assertion that any defect or insufficiency of the vessel or her equipment is, standing alone, proof of negligence. Willock does not say that a defect that exists without negligence is negligence! The case cited (*Howarth* v. *U. S. Shipping Board Corporation*, 24 F. (2d) 374) was one in which there was *nothing to hold the door open in any kind of weather but a brick*. The vessel was an ocean going freighter, and there was no element of necessary closing of the door in heavy weather, as there was with respect to the deckhouse doors on this small tug with a 14 inch freeboard, and no element of the known and confessed duty of the plaintiff himself to close the door under the conditions. What the *Howarth* case holds, as is clear from its facts, is that failure due to proved negligence to provide a safe place to work is actionable under the Jones Act, and the court which gave that opinion cites it for that proposition. *Rey* v. *Colonial Navi-*

gation Co., 116 F. (2d) 580, 581 (CA 2, 1941). No negligence except plaintiff's is proved here.

Plaintiff succeeds in proving but one thing—that he himself caused his own injury by failing to perform his known deckhand's job. That conclusion is clear, supported by the plaintiff's own admissions. There is no evidence to support any other conclusion. The trial Court's decision in favor of the defendant was the inevitable consequence. The Court of Appeals has reviewed the record and unanimously concurred. Petitioner frankly stated to the District Court, which heard the trial and knew the record, that it was that Court's duty to direct a verdict for the defendant unless the Jones Act made defendant an "absolute insurer" of plaintiff, as above quoted.

On the claim for maintenance and cure, the District Court entered a judgment for defendant for failure of proof, and the Court of Appeals found no substantial evidence that would support a verdict that plaintiff was entitled to more than he *had already received;* but it is not true that the Court of Appeals affirmed the District Court's judgment for the defendant on those counts. On the contrary, it sent those counts back for retrial—in admiralty. (191 F. (2d) 82, 84-86.) The reason was that, in the absence of diversity of citizenship, the law side of a District Court of the United States has no jurisdiction of a suit for maintenance and cure. Since the decision *en banc* of the seven judges of the Third Circuit Court of Appeals in *Jordine* v. *Walling,* 185 F. (2d) 662 (1950) brought that circuit into agreement (unanimously overruling its own earlier and ill-considered decision, *idem* 671, relied on by Petitioner) there is no difference among Courts of Appeal on that point (*Jordine* v. *Walling,* 185 F. (2d) 662 (1950); *Modin* v. *Matson Navigation Co.*, 128 F. (2d) 194, 196 (CA 9, 1942); *Philadelphia & R. R. Co.* v. *Berg,* 274 Fed. 534, 539 (CA 3,

1921); cert. den. 257 U. S. 638; *The Sarah*, 21 U. S. 391, 394 (1823); Benedict, Admiralty, (6th ed. 1940), § 612, p. 201;) and it is a point that the Rules did not change. (F.R.C.P., Rule 82.)

Under the circumstances it is premature for us to discuss the evidence going to maintenance and cure. Petitioner's presentation is, again, a tissue of omissions and misstatements. He says that Petitioner (injured right at the end of the navigating season of 1947) (R. 67) was unable to work again until May 17, 1948 (Br. 12) the inference being that his earnings were interrupted, because of this injury, through the whole winter. Petitioner's statement is without evidential support. At some time before December 26, 1947, Petitioner admits his doctor (R. 77), who was at Indiana Harbor, told him to go back to work, and, on December 26, 1947, gave him a certificate to go back to work.[2] Defendant has paid his medical and hospital bills. In any event, this was the off-season, when only some tug men work and then only when they get a "call." Petitioner admitted he got no "call" *either that off-season, or the next.* (R. 77, 78) But he admitted that he worked through both navigating seasons next following and intervening before the trial (R. 57, 58, 81, 82) as a deckhand (R. 54) at increased wages. (R. 79) There is no support for Petitioner's assertion.

Whether Petitioner meant to bolster his erroneous statement of loss of earnings on account of a long disability, or had some other purpose in making his further assertion that Petitioner suffered a 40% loss of use of his right hand (Br. 12), it should be pointed out that there is no such

[2] Petitioner: "The last day was, I think, the day after Christmas, the 26th of December, when I got a release from Dr. Cole. He wanted me to go back to work before that, so I asked him, 'Well you have got to give me a release of some kind so I can go.' So he did on the 26th, the day after Christmas." (R. 43)

evidence. It was stricken—all Petitioner's medical evidence, given by a doctor to whom his lawyer sent him and who gave him no treatment (R. 52, 53) was stricken—because based on subjective symptoms. (R. 99) Petitioner made no argument to the District Court against the ruling that struck it, and has made no complaint of it, either in the Court of Appeals or here; no question of the correctness of the ruling was before that Court, or arises here, and the "evidence" to which Petitioner refers this Court is not evidence at all. Petitioner's statement (Br. 12, 25) that he was "required" to make trips from his home in Chicago to Indiana Harbor for further treatment is peculiarly unwarranted. As a seaman, Petitioner was entitled to receive at the Chicago Marine Hospital of the United States Public Health Service any treatment whatever that he might require, free of charge. (*Bailey* v. *City of New York*, 153 F. (2d) 427 and cas. cit.)

Indeed, this service, maintained by the United States Public Health Service, was offered to him, in writing, and his counsel put the offer in evidence (Exh. 8) for the avowed purpose which he stated:

> "I intend to argue to the jury the reason he was not healed, instead of giving him medical treatment you were claiming to give him, you offered to put him off on the Public Health Service." (R. 186)

Neither in this Court nor the Court of Appeal has Petitioner questioned the established rule that a seaman cannot recover from his employer maintenance and cure freely available to him at the Marine Hospital of the United States Public Health Service. *Bailey* v. *City of New York*, 153 F. (2d) 427 (CA 2, 1946); *The Santa Barbara*, 263 F. 369, 371 (CA 2, 1920); *The J. F. Card*, 43 Fed. 92, 95 (D. Ct. Mich. 1890). The court will take judicial notice of these free services. (*The J. F. Card*, 43 Fed. 92, 95, *supra.*) Counsel's

revision of his jury argument for this Court is the unsupported statement that Petitioner was "required" to make a long, expensive trip to Indiana Harbor from his home in Chicago. No one (least of all the defendant) "required" him to do anything of the sort.

Equally without foundation are Petitioner's assertions that there was no motion for a directed verdict as to some of the counts. These assertions sometimes take the form of statements that there was no motion except as to the first count; sometimes that the motion came during the "argument"; sometimes it is insinuated that there was no motion at the close of the evidence until after verdict.

The only statement Petitioner makes on the subject that is true, is that there was no *written* motion as to Count III. There certainly was an oral motion, going to all counts, as the District Court and the Court of Appeals both found. The motion was made at the close of all the evidence (not during argument to the jury) as both courts also found, and under the Federal Rules of Civil Procedure the motion was no worse for being oral. (Rule 7 (b) (1).)[3]

[3] The Rule reads: "An application to the court for an order shall be by motion which, *unless made during a hearing or trial,* shall be made in writing," etc. (Our emphasis.)

The District Court said *inter alia*: "At the trial at the conclusion of all the evidence, defendant moved orally for a directed verdict on all three counts of the plaintiff's complaint, specifying the grounds which entitled it to a favorable decision." (R. 260)

The Court of Appeals said: "At the close of the plaintiff's case, defendant moved for a dismissal on all counts, upon which motion the court reserved its ruling. At the close of all the evidence the defendant, by oral motion, moved for a directed verdict, upon which motion the court also reserved its ruling. The case was then submitted to the jury, which returned a verdict of $4,500 in favor of the plaintiff. On April 7, 1950, the day following the return of the verdict, the court set the reserved motions for argument on April 26, 1950, and after hearing arguments thereon,

If *no* motion were made until after verdict in a suit on the law side of a United States District Court, the absence of any request for a ruling might or might not be "jurisdictional." That is not the case. The case is that the motion for directed verdict was made before verdict and *expressly reserved by the District Court* on its own motion and for its own convenience, which heard argument, and sustained it. When the District Court has itself reserved its ruling, and the motion is neither overruled when made nor allowed to lapse by absence of such reservation (especially when, as here, plaintiff made no objection to the court's announcement of reservation of its ruling) it cannot be supposed, and has never been held, that a defendant must make some further motion in order to preserve to the District Court *jurisdiction* of the motion already made, and which the District Court has expressly reserved.[4] The contrary is held, both before the Rules (*Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654 (1934)) and since the Rules (*Kline* v. *Yocum*, 117 F. (2d) 370, 373 (CA 7, 1941)); *Boston & M. R. R. Co.* v. *Coppelletti*, 167 F. (2d) 201, 202, 204 (CA 1, 1948) whose purpose (as stated in Rule 1) would be defeated by exalting such dry technicalities as Petitioner puts forward, and was rather to extend the powers of the Dis-

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sustained the motions and entered a judgment for the defendant." (191 F. (2d) 82, 82-83.)

A written motion that omitted Count III, prepared in advance to meet the various possibilities that might arise on trial was inadvertently presented. The question whether this waived the oral motion that went to all three counts was considered and decided by the District Court, which held it was not a waiver. That question is not presented here (and was not raised in the Court of Appeals.)

[4] The only point "distinctly made" by Petitioner in this connection is that the District Court (which had itself reserved its ruling on the motion) did not treat the making of a further motion as "jurisdictional." See Petition for Certiorari, pages 4, 5, and this Court's Rule 38(2).

trict Court than to deprive it of *jurisdiction* that it already possessed. If the foregoing were not enough, it is also true that the jurisdictional point that arises is this: There being no diversity the District Court had jurisdiction of the claims for maintenance and cure only in admiralty, as the Court of Appeals held (and as all Courts of Appeal that have considered the question now hold. *Vide supra.*) The Federal Rules of Civil Procedure do not apply to admiralty matters. (Rule 81)

In short, none of the grounds for certiorari alleged by the Petition exist.

In conclusion:

The questions "specifically brought forward" by the petition are categorically listed at pages 4 and 5 of the petition under Arabic numerals "1" to "4"[5] and the reasons relied upon for allowance of the writ are stated at pages 5 and 6.

Number "1," in somewhat more prolix form, is the proposition that the Jones Act creates liability without fault, above discussed. The alleged reason for granting the writ (to consider that question!) is that the decisions below, holding that the Jones Act does not create liability without fault, are "probably in conflict with the applicable decisions of the Court above cited." On the contrary, if the courts below had held that the Jones Act allows recovery without fault they would have been in defiance of this Court and of Congress. *DeZon* v. *American President Lines*, 318 U. S. 660, 671-672.

Petitioner's question number "2" is: "Whether the doctrine of *res ipsa loquitur* applies in actions under the Jones Act." The alleged reason given (as number "4" on

[5] "Only questions specifically brought forward by the petition for writ of certiorari will be considered." (This Court's Rule 38 (2).)

page 6 of the petition) for granting certiorari, to consider *that* question, is that the Court of Appeals "fails to consider that the doctrine of *res ipsa loquitur* applies in actions under the Jones Act." But that is not supported by the Court's opinion. The Court of Appeals stated the facts, as above quoted. To say the very least, it is not apparent that such facts require judicial discussion of *res ipsa loquitur* in any kind of case. The question Petitioner brings forward, viz., whether *res ipsa loquitur* "applies in actions under the Jones Act" is not affected. The Court of Appeals does not discuss it. It may be that petitioner's counsel feels that whether *res ipsa loquitur* applies in *this* case is not a question of "grave public importance," or perhaps his counsel fails to bring *that* question "distinctly" forward because, like us, he fails to find authority in this Court, or in any Court of Appeal, on that question that would so help his general position as to make that, even colorably, a question for certiorari in the existing state of the law. The peculiar wordings of Petitioner's "question" and "reason" here spring from the same root as his question number "1"—the effort, directly or indirectly—somehow or anyhow—to secure a result whereby the Jones Act would make the employer an "absolute insurer," as Petitioner expressed his position to the District Court.

Petitioner's question number "3" is "whether in an action under the Jones Act a seaman may recover his damages for cure and maintenance along with his damages for negligence on the law side of the Court." The question, as put, involves a false assumption. Cure and maintenance are not recovered under the Jones Act. The Jones Act (a statute of the United States) gives a remedy for negligence. Cure and maintenance are rights *ex contractu*, arising under the admiralty law. In the absence of diversity, the powers of the District Courts on the law side, never have

extended to purely admiralty claims. Any different view would throw every maritime cause before a jury. Where, however, there is diversity (and jurisdictional amount) the statutory jurisdiction of the District Courts attaches. There is no difference today among Federal Courts on these propositions. (Auth. cit.) Petitioner's only alleged "reason" (Petition, p. 6) for granting certiorari to consider them here, is that "it is contrary to the applicable decisions of this Court and certain District Courts." The only decision of this Court then cited is the *Aguilar* case, 318 U. S. 724, which is not in conflict. (Even the District Court decisions referred to are not to the contrary.)

Petitioner's question number "4" is whether a motion under Rule 50 is jurisdictional. The petition overlooks the facts that the District Court itself, instead of denying the motion for directed verdict or allowing it to lapse, expressly reserved it, and then sustained *that* motion. Nothing in the purely permissive language of Rule 50 as to what the party may do, can be tortured into a denial of *power* to the *District Court* to reserve its *jurisdiction* over a question which it defers for its own convenience, a power it has always had (*Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654 (1934)) continues to have (*Kline* v. *Yocum*, 117 F. (2d) 370, 373 (CA 7, 1941); *Boston & M. R.R. Co.* v. *Coppelletti*, 167 F. (2d) 201, 202, 204 (CA 1, 1948)) and which no decision denies to it. This is not a case in which an appellate court which did not hear the trial seeks to reverse a District Court determination that judgment may go for the plaintiff. On the contrary, this is a case in which the District Court, that heard the trial, determined after deliberate consideration that judgment must go for the defendant; and the Court of Appeals, carefully reviewing the record, affirmed.

Petitioner has not asked this Court to grant certiorari to overhaul concurrent determinations of the courts below

on the sufficiency of the evidence, doubtless because this Court has recently emphasized that that is a question peculiarly for the District Court which heard the trial (Auth. cit.) and because the Court of Appeals, thoroughly reviewing just that question, put his own admissions so squarely. What he asks, in downright terms (Br. 15) is that this Court hold that the Jones Act creates "liability without fault," (Petition, 4). As he put the same thought, in equally downright terms, to the District Court, his only basis of claim is that the Jones Act makes the employer "an absolute insurer." (*Vide supra.*) He then asks this Court to say that the District Court's statutory jurisdiction of common law and equity entirely engulfs the separate admiralty jurisdiction, and that the District Court cannot, of its own motion and for its own convenience, reserve jurisdiction to pass on a motion for directed verdict. On each head it seems to us that Petitioner asks this Court to commit the fault that it rarely finds against the courts below, namely, to depart from "the usual and accepted course of judicial proceedings."

Respectfully submitted,

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